Circuit was constrained to reverse a conviction for failure of the trial judge to grant a continuance. Coincidentally, distinguished counsel for the prisoner in this appeal was also the trial counsel who was unavailable in *Balk*.

The State of Michigan is not seeking to attack the rule stated in *Balk's* case. Indeed, we agree with the Court that under the facts of *Balk's* case, Balk was in law denied a fair trial. It is, however, the State's position that the prisoner *in this appeal*, under the facts *here presented* is treating the trial of a criminal case as though it were a game or sport in which the prisoner, under the sanction of appellate court decisions, is to be assisted by the law in unreasonably delaying trial. The State respectfully suggests that this Court disabuse him of such ideas.

Balk, we contend, is distinguishable from the appeal at bar on several distinct and rather important grounds.

First of all, in *Balk* the accused advised the Court that he "desired Mr. Louisell to try his case and, if not, that he should have more time to select a lawyer that he had confidence in." (318 F. 2d at 291). Here, the prisoner never evidenced any desire for representation by counsel other than the firm of Louisell & Barris. This whole complicated series of prosecutions (the gun case, the blackjack case, and the loan-shark conspiracy case) were handled not by Mr. Louisell personally, but by various members of the firm—including Mr. Louisell—who appeared both separately and together during various phases of the respective cases. (App. 106-108). Thus, for example, the proceedings of November 8, 1968, contain the following colloquy between Mr. Fink (Mr. Louisell's associate) and the trial judge:

> "THE COURT: Now, will there be an attorney available for Mr. Giacalone to argue those pretrial motions on the 12th?

"MR. FINK: Somebody from our office will be there.

"• • •

"THE COURT: If you're going to be here anyhow in the morning, wouldn't it be just as well to schedule a hearing on the motions for 10:30 that morning?

"MR. FINK: If we can find a lawyer in our office available. I think everybody is tied up Tuesday morning. We will just make an effort to have somebody here." (App. 542-544).

Unlike *Balk*, therefore, this is not a case where the defendant needed time to retain other counsel, but rather is a case where a continuance was desired so that more prestigious counsel would have an opportunity to appear for a party already adequately represented by other able counsel.

In *Lias v. United States*, 51 F. 2d 215 (4 Cir. 1931), aff'd. 284 US 584, the Court approved the denial of a continuance sought because of the illness of the chief counsel for the defendant. The Court noted that the defendant had been represented by two other members of the same firm. Also, see *Anno*: "Continuance of Criminal Case because of Illness or Death of Counsel," 66 ALR 2d 267, at 281-287.

Second, the continuance in *Balk* was sought for the convenience of the accused. Here, delay was sought solely for the convenience of Attorney Louisell and his doctor.

Third, the opinion in *Balk* is devoid of references to any prior adjournments. Here, two continuances (and a change of venue) had already been granted to this prisoner. (App. 133; App. 2-4).

Fourth, in *Balk's* case, this Court found *good cause shown* for a continuance on the eve of trial. Here, the State trial judge found that:

> ". . . There was no affidavit or sworn testimony submitted regarding Mr. Louisell's unavailability . . .
>
> ". . . On November 14 [trial date] it was made to appear by defense counsel that Mr. Louisell was confined to the hospital, and there was in effect another request for a continuance . . . This was likewise an oral request. Like the prior oral request for adjournment, this request was unaccompanied by supporting affidavit or sworn testimony regarding Mr. Louisell's unavailability . . . The remarks of the court clearly encouraged the filing of a motion to supplement the record. However, no such motion to supplement accompanied the next pleading or court appearance.
>
> ". . . a written motion for new trial was filed . . . No affidavit was filed and no sworn testimony was proffered regarding Mr. Louisell's unavailability . . .
>
> ". . . On December 5, the defendant was sentenced. At the sentencing hearing, no affidavits regarding Mr. Louisell's hospitalization were filed and no proofs on this subject were presented or proffered, nor was a motion filed . . .
>
> "On December 6, oral argument was heard on the motion for new trial. In the course of oral argument, neither affidavits nor sworn testimony was presented or proffered concerning Mr. Louisell's hospitalization. . . .
>
> " * * *

"Despite the clear manifestation by the Court on December 6 that Mr. Louisell's incapacity was not established to the Court's satisfaction, at the next opportune moment no affidavits were filed and no sworn testimony presented or proffered regarding Mr. Louisell's hospitalization.

"The next opportune moment came on or about December 8, 1968, when a supplement to the motion for new trial was filed. No affidavit concerning Mr. Louisell's hospitalization accompanied the supplement to the motion for new trial. Nor was there any sworn testimony presented or proffered at the hearing . . . . on December 13, 1968."

—App. 176-179

The above factual findings of the State trial judge are not clearly erroneous, but to the contrary are supported by substantial evidence. (App. 534-577). Accordingly, such findings are, by Act of Congress, "presumed to be correct." Title 28, U.S.C. § 2254(d). The prisoner has not established by "convincing evidence that the factual determination by the State court was erroneous." Title 28, U.S.C. § 2254(d).

Application of the foregoing principle to this appeal is not difficult. This prisoner and counsel were afforded numerous opportunities to submit affidavits or to proffer testimony. Indeed, the State trial judge openly invited such proofs. (App. 176-179). No evidence of any kind was submitted.

Indeed, there was an express waiver here. Counsel for the prisoner (Mr. Louisell) specifically stated:

". . . on reading the transcript of the proceedings at

> Centerville, I notice that you told Mr. Barris that Mr. Barris might, or I might, be accorded an opportunity to supplement the record with respect to my hospitalization.
>
> "I don't think at this posture that it is a matter with which we are germanely concerned on the motion for new trial." (App. 178).

The question here presented, therefore, is whether, in light of the concrete factual context of this case, the State trial judge abused his discretion in finding that no good cause had been shown for an adjournment on the eve of trial.

In *People v. Mason* (1886), 63 Mich 510, at 511, and in *People v. Smith* (1952), 334 Mich 10, at 12, the Supreme Court of the State of Michigan said:

> "A mere statement of counsel that the respondent is not prepared for trial is not sufficient basis for a continuance of the cause. The practice and rules of court require such applications to be supported by affidavit showing the necessity for delay, and, in the absence of such showing, it was not error to overrule the motion."

This philosophy is also embodied in Michigan General Court Rule 503 which provides in pertinent part:

> "... Continuance for any cause shall not be granted *unless a showing is made* and the court finds that the grounds for continuance do not arise out of the fault or negligence of the moving party and the court finds that substantial justice more nearly will be obtained." (Emphasis supplied).

Local Rule 31(b) (9) of the Circuit Court for the County of Wayne (Michigan), specifically provides:

> "9. No trial of a criminal case shall be adjourned except by the Presiding Judge *for good cause shown* upon written motion of the party seeking the adjournment."

The failure of the moving party to *show* good cause for a continuance on the alleged ground of illness of counsel is fatal to his argument. A large number of cases uphold the refusal of a continuance where the applicant failed to support his motion with sufficient supporting papers. See, *Anno*: "Continuance of Criminal Case because of Illness or Death of Counsel," 66 ALR 2d 267, at 273-279. Also, see *Anno*: Continuance: "Requirements and sufficiency of application for continuance," 4 ALR Fed at 944-946.

As was so lucidly stated by Mr. Justice White in *Ungar v. Sarafite* (1964), 376 US 575, at 589-590, 84 S Ct 841, 11 L ed 2d 921:

> "The matter of continuance is traditionally within the discretion of the trial judge. . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, *particularly in the reasons presented to the trial judge* at the time the request is denied . . ." (Emphasis supplied).

See, also *People v. Fitzgerald* (1924), 226 Mich. 402.

To recapitulate: Attorney Louisell was voluntarily in the hospital for non-emergency diagnostic tests. The trial date had been previously continued. Members of Mr. Louisell's

firm (associated with him in the defense of this series of cases) sought a continuance. No affidavits were filed nor was any testimony proffered as to the unavailability of Mr. Louisell. The trial judge clearly indicated that he wanted some evidence of the alleged unavailability. None was forthcoming. The continuance was denied. The prisoner, thereupon proceeded to trial represented by two of Mr. Louisell's very able associates.

As a matter of law, the State of Michigan contends that this prisoner cannot now claim an abuse of discretion on the denial of a continuance where the prisoner failed to show any good cause for such continuance. Under the facts as found by the State trial judge, the denial of a continuance was here proper.

CONCLUSION AND PRAYER

For the aforegoing reasons, the State contends that the conviction here assailed was not violative of any constitutional right of the prisoner.

Accordingly, the State respectfully prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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